

Exhibit 9

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS.

HODES & NAUSER, MD's, PA,
et al.,

Docket No. 11-2365-CM

Plaintiff,

Kansas City, Kansas
Date: 7/1/11

V.

ROBERT MOSER, et al.,

Defendants.

TRANSCRIPT OF
TEMPORARY RESTRAINING ORDER HEARING
BEFORE THE HONORABLE CARLOS MURGUIA,
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

For the Plaintiffs: Teresa A Woody
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For the Defendants: Jeffrey A Chanay & Steve R Fabert
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Movant: Cheryl A Pilate
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Court Reporter: Nancy Moroney Wiss, CSR, RMR, FCRR
Official Court Reporter
558 US Courthouse
500 State Avenue
Kansas City, KS 66101

15:03:16 1 THE COURT: Give me a moment please just to
15:03:18 2 set up here. Let the record show we're here regarding
15:03:44 3 Case Number 11-2365. It's a case entitled -- may have
15:03:53 4 to help me with the pronunciation of the plaintiffs'
15:03:55 5 names.

15:03:55 6 MS. WOODY: Doctors Hodes and Nauser.

15:03:59 7 THE COURT: Hodes and Nauser versus Moser,
15:04:04 8 et al. Would the parties please enter their appearance?

15:04:06 9 MS. WOODY: Your Honor, Teresa Woody on
15:04:08 10 behalf of the plaintiffs, and here are Doctor Hodes and
15:04:11 11 Doctor Nauser, and with me is Bonnie Scott Jones who's
15:04:14 12 been admitted pro hac vice this morning.

15:04:17 13 THE COURT: Thank you.

15:04:19 14 MR. CHANAY: Your Honor, on behalf of the
15:04:21 15 defendant, it's Jeffrey Chanay, Deputy Attorney General
15:04:24 16 of Kansas, and with me is Steve Fabert, Assistant
15:04:27 17 Attorney General.

15:04:28 18 THE COURT: Thank you. Appreciate the
15:04:29 19 parties accommodating the court with the scheduling of
15:04:32 20 this hearing on very short notice. There is something
15:04:36 21 before and pending at this time, which would be
15:04:40 22 plaintiffs' motion for temporary restraining order
15:04:44 23 and/or preliminary injunction, which is Document Number
15:04:48 24 Four. This morning, the court granted Aid For Women's
15:04:53 25 motion to intervene as well as Aid for Women has filed a

15:04:58 1 motion to join plaintiff's motion for temporary
15:05:01 2 restraining order and/or preliminary injunction, which
15:05:04 3 is Document 27. Upon review of the motion, the court
15:05:09 4 grants Aid for Women's motion. As a result, for our
15:05:14 5 record, Miss Pilate, if you could enter your appearance
15:05:19 6 as well here at this hearing.

15:05:20 7 MS. PILATE: Thank you, Your Honor. Good
15:05:22 8 afternoon. Cheryl Pilate for intervenors Central Family
15:05:27 9 Medical, LLC, doing business as Aid for Women, and also
15:05:31 10 representing Doctor Ronald Yeomans who is present with
15:05:34 11 me at counsel table. Thank you.

15:05:38 12 THE COURT: In regards to our court
15:05:39 13 appearance this afternoon, the court has scheduled this
15:05:43 14 to be heard, but with that, there's some time
15:05:47 15 limitations the court has informed the parties about
15:05:51 16 regarding their arguments or however you want to use
15:05:55 17 your time. Hopefully, you both were -- all of you were
15:05:58 18 informed, and you have 30 minutes per party, and we
15:06:04 19 actually have set up a timer that will be placed in
15:06:09 20 front of the podium that I would trust and ask that you
15:06:14 21 monitor and keep track of, and what I'll do is let you
15:06:19 22 know if you want a warning when you're about to have
15:06:22 23 your time expire. I would request please that when that
15:06:26 24 timer shows that you have zero time remaining, that you
15:06:29 25 stop. If not, I will have to interrupt you with

15:06:33 1 whatever is being presented or being argued. Yes?

15:06:37 2 MS. WOODY: Your Honor, we would like to
15:06:39 3 divide the argument and provide at least a short period
15:06:42 4 of time for intervenors to make a comment to the court
15:06:46 5 with respect to the argument.

15:06:48 6 THE COURT: That's fine. If there's nothing
15:06:50 7 else, we'll start at this time. Miss Woody.

15:06:54 8 MS. WOODY: Good afternoon, Your Honor. May
15:07:03 9 it please the court. We are here on behalf of Doctors
15:07:07 10 Hodes and Nauser requesting injunctive relief of the
15:07:10 11 licensing process and temporary regulations promulgated
15:07:14 12 under Senate Bill 36. Doctor Hodes and Doctor Nauser
15:07:17 13 are very well respected physicians with a clinic located
15:07:21 14 in Overland Park, Kansas where they operate an
15:07:24 15 obstetrics and gynecology practice. Doctor Hodes has
15:07:28 16 been practicing in this field for over 30 years. Doctor
15:07:32 17 Nauser has been practicing with Doctor Hodes for
15:07:35 18 13 years, and he is her father. Doctor Nauser and
15:07:39 19 Doctor Hodes have a full OB/GYN practice which includes
15:07:43 20 a full range of services including gynecological
15:07:47 21 surgeries. They also perform abortions in their
15:07:49 22 practice, and especially are referred to by other
15:07:52 23 physicians in instances where there are complications,
15:07:54 24 medical complications for the woman, or where there is a
15:08:00 25 fetal anomaly that would require an abortion. They have

15:08:06 1 been providing these services at their same clinic in
15:08:09 2 Overland Park for over 24 years without incident. Since
15:08:13 3 2002, their practice like all other practices in the
15:08:16 4 state of Kansas where office surgeries are performed in
15:08:21 5 a physician's office have been regulated by the Kansas
15:08:25 6 Board of Healing Arts, which in 2002 had a panel of some
15:08:28 7 35 doctors who promulgated standards for offices in
15:08:32 8 Kansas where office surgeries were performed. With
15:08:37 9 respect to these regulations which apply to all surgical
15:08:40 10 procedures and offices, whether -- not just abortions,
15:08:43 11 but other procedures for dental procedures,
15:08:49 12 gastroenterology, all those sorts of surgeries that can
15:08:51 13 be performed in an outpatient basis at a doctor's
15:08:54 14 office, many of which are far more risky and invasive
15:08:59 15 than abortion procedures performed at Doctor Hodes and
15:09:02 16 Doctor Nauser's office, they've been regulated under
15:09:04 17 these -- these standards promulgated by the board of
15:09:07 18 healing arts for some eight years, and they are
15:09:10 19 inspected routinely with respect to these procedures by
15:09:13 20 representatives of the Kansas Board of Healing Arts.
15:09:19 21 On May 16th of this year, however, the
15:09:22 22 Kansas legislature enacted Senate Bill 36, and under
15:09:25 23 that bill, said that it would become effective July 1st,
15:09:30 24 and that anyone who was not licensed, any provider who
15:09:33 25 was not licensed as of that date would not be allowed to

15:09:36 1 perform abortions, and that any abortions performed
15:09:39 2 after that date without a license would be considered a
15:09:41 3 crime. KDHE was charged with implementing regulations
15:09:45 4 under that act, and it is those temporary regulations
15:09:49 5 and the licensing procedure that we are asking the court
15:09:52 6 to enjoin today.

15:09:55 7 That occurred on May 16th, the act was
15:09:59 8 enacted. Doctor Hodes and Doctor Nauser immediately
15:10:01 9 reached out to the KDHE to say it's going to be
15:10:04 10 impossible for you to both promulgate regulations and
15:10:08 11 give the providers an opportunity to comply in a very
15:10:11 12 limited time before July 1st. They basically heard
15:10:15 13 nothing until May 26th when they were told that
15:10:18 14 temporary regulations would be forthcoming. On July
15:10:22 15 9th, they did receive a copy of draft regulations from
15:10:26 16 the KDHE.

15:10:26 17 THE COURT: June 9th? June 9th?

15:10:29 18 MS. WOODY: June 9th. I'm sorry, on
15:10:31 19 June 9th, they received -- they received the draft of
15:10:33 20 the temporary regulations from the KDHE, and these
15:10:37 21 imposed stricter regulations, more stringent regulations
15:10:41 22 on their facility than had previously been -- that they
15:10:44 23 had previously been subject to under the standards of
15:10:48 24 the board of healing arts. They were also told that
15:10:52 25 they would have a licensing application, that the

15:10:55 1 licenses would -- application would be available on
15:10:57 2 June 13th, and that they were to have their -- their
15:11:00 3 license application submitted no later than June 17th.
15:11:04 4 On June 13th, in the intervening time-frame, they -- in
15:11:09 5 addition to getting the license application, they also
15:11:11 6 received notice that the regulations, the draft
15:11:14 7 regulations they had initially been provided on June 9th
15:11:17 8 were being revised, and that they would get revised
15:11:20 9 copies of those regulations at some point in the future,
15:11:23 10 those temporary regulations.

15:11:26 11 That occurred after they had actually
15:11:29 12 submitted their application on June 17th, as was
15:11:32 13 required procedurally. They then received on the
15:11:35 14 morning of June 20th new regulations that -- new
15:11:39 15 temporary regulations and were told that these temporary
15:11:42 16 regulations would be the ones that would be applied to
15:11:44 17 determine whether they were able to get a license on
15:11:47 18 July 1st. These new regulations were far more stringent
15:11:51 19 even than the draft regulations that had been provided
15:11:55 20 to them on June 9th. They had extremely strict
15:11:58 21 standards, provided, for instance, for two hours of
15:12:01 22 recovery for any patient of an abortion procedure, an
15:12:05 23 amount of recovery time far in excess of anything
15:12:08 24 required either at the Kansas hospitals or Kansas
15:12:12 25 ambulatory surgical centers for much more invasive and

15:12:16 1 risky surgical procedures. They also imposed extremely
15:12:19 2 strict physical plan regulations mandating the size of
15:12:24 3 the rooms in which procedures could be performed,
15:12:26 4 mandating that each room have its own washing -- hand
15:12:30 5 washing and facilities, sink and a lavatory by itself
15:12:34 6 attached to each procedure room, and standards such as
15:12:37 7 requiring 50 square feet of janitorial storage for each
15:12:41 8 procedure room which for the Hodes practice and Nauser
15:12:45 9 practice would have meant 350 square feet of janitorial
15:12:48 10 storage alone.

15:12:51 11 Upon reviewing these regulations, Doctor
15:12:55 12 Hodes and Doctor Nauser reached out to the KDHE, and
15:12:58 13 asked if there would be waivers available, because it
15:13:01 14 was impossible for them to comply by July 1st. It would
15:13:06 15 have required them essentially to tear down their
15:13:08 16 building and re-build it, totally reconfigure it and --
15:13:12 17 and make it larger. They were told there would be no
15:13:16 18 waivers, and that they -- if they were -- failed to be
15:13:19 19 in compliance by July 1st, their license would be
15:13:22 20 denied. This is inconsistent with the way other Kansas
15:13:25 21 state regulations have been applied, particularly ones
15:13:27 22 for hospitals where when there's a change in the
15:13:29 23 physical plan for a hospital facility, they've been
15:13:32 24 given up to two years to make those changes. But for
15:13:35 25 these providers, and there are only three providers of

15:13:38 1 abortions in the state of Kansas that were affected by
15:13:40 2 these, for these three providers, there was a -- they
15:13:43 3 were to comply with these regulations within nine days
15:13:46 4 of having received these regulations or their license
15:13:49 5 would be denied.

15:13:52 6 Obviously, there was an inspection scheduled
15:13:55 7 for even sooner than that. The original inspection was
15:13:57 8 scheduled for June 27th, and they asked to have that
15:14:02 9 moved until June 29th, but even so, recognized that it
15:14:06 10 would be totally impossible for them to comply with
15:14:08 11 these regulations, come the physical plan status alone,
15:14:14 12 and so, they have moved this court for temporary
15:14:17 13 injunction. They knew there's -- the state has raised
15:14:20 14 an argument that there's some potential waiver because
15:14:23 15 they didn't go through and exhaust their administrative
15:14:27 16 remedies, but there was absolutely no purpose for them
15:14:30 17 going in that manner. They'd all ready been told that
15:14:32 18 they would not get a waiver, and they knew that they
15:14:35 19 would not be able to comply with those regulations by
15:14:37 20 July 1st.

15:14:38 21 And indeed, this morning, even though this
15:14:42 22 motion for temporary restraining order and preliminary
15:14:44 23 injunction was pending before this court, they received
15:14:46 24 from the KDHE notice of intent to deny their license
15:14:50 25 which came in at about 10:15 or 10:30 this morning.

15:15:00 1 It's clear that these regulations -- these temporary
15:15:03 2 regulations and this licensing process infringe on the
15:15:08 3 plaintiff's due process. There is absolutely no way
15:15:13 4 that they could have complied with this -- with these
15:15:16 5 requirements in the very limited, very quick time-frame
15:15:20 6 provided to them, and there was absolutely no way that
15:15:24 7 they were going to be able to continue providing
15:15:28 8 services to women who needed those services without --
15:15:33 9 without -- they simply would have to close, and indeed
15:15:36 10 they were denied a license, and now are unable to
15:15:38 11 provide those -- those abortions at their facility under
15:15:43 12 the licensing today.

15:15:45 13 So, it's clear that there's irreparable harm
15:15:48 14 to them, there's irreparable harm to the women that they
15:15:52 15 serve. For instance, just in the last couple of days --
15:15:55 16 and we've submitted this in our supplemental declaration
15:15:57 17 of Doctor Hodes -- just in the last couple of days, he
15:16:00 18 has been referred patients by referring physicians
15:16:04 19 because of his expertise in this area where there were
15:16:07 20 serious medical conditions for the woman or a medical
15:16:12 21 anomaly for the fetus, in both of those instances, he
15:16:16 22 has been unable to perform the abortions that the
15:16:20 23 referring physician requested because these regulations
15:16:24 24 are now in place. This has put these women in a
15:16:28 25 position where they are unable to get the medical

15:16:31 1 treatment they need in the state of Kansas, and so,
15:16:34 2 despite the -- despite the state's argument that this
15:16:38 3 will heighten medical processes and medical procedures
15:16:45 4 for women in Kansas, it in fact is denying women who
15:16:49 5 very much need these services, the ability to access an
15:16:53 6 abortion in Kansas, because they can't get them at
15:16:56 7 Planned Parenthood, and Doctor Hodes and the referring
15:16:59 8 physicians are unaware of any other abortion provider
15:17:02 9 who can provide those services in the state of Kansas
15:17:05 10 for women who have these kind of complications or these
15:17:08 11 kind of fetal anomalies.

15:17:11 12 So, there is -- there -- you can quickly see
15:17:15 13 that there is an undue burden both on the doctors and on
15:17:18 14 the patients who are unable to access these procedures,
15:17:22 15 even though they need them. In addition, it is clear
15:17:27 16 that these regulations really were designed to make
15:17:32 17 access to abortion more difficult in the state of
15:17:34 18 Kansas.

15:17:35 19 Now, the state tries to argue that because
15:17:37 20 they have granted Planned Parenthood a last minute
15:17:42 21 license, that -- that there is adequate access, and
15:17:46 22 there isn't a problem with the regulations, and they
15:17:48 23 cite to the court the Greenville case, and say that
15:17:51 24 regulations on facilities are okay, and basically imply
15:17:56 25 that anything that the state wants to do, any kind of

15:17:58 1 regulations that the state wants to impose should not be
15:18:04 2 unconstitutional.

15:18:07 3 We've cited to the case -- a case very
15:18:09 4 similar to this in 2007 where Judge Smith in the Western
15:18:13 5 District of Missouri, in examining some regulations
15:18:15 6 very, very similar to those here, only those here are
15:18:18 7 actually even more onerous and more burdensome than the
15:18:22 8 ones that were being addressed by the court with the
15:18:27 9 Missouri regulations, he did find that there was both a
15:18:30 10 likelihood that it violated plaintiff's due process, and
15:18:34 11 that it imposed an undue burden on both the doctors and
15:18:37 12 the women with respect to the constitutionality of those
15:18:41 13 regulations, and granted a preliminary injunction on
15:18:44 14 that matter.

15:18:46 15 If you look at the regulations in the chart
15:18:49 16 that we've provided, you can see that the regulations
15:18:51 17 far exceed anything that is required for Kansas
15:18:56 18 ambulatory surgical centers, for Kansas hospitals, and
15:19:00 19 certainly, even the case that they cite, the Greenville
15:19:03 20 versus South Carolina case, the regulations in those
15:19:07 21 cases -- in that case, the physical regulations were far
15:19:10 22 less stringent, far less onerous, far less specific and
15:19:15 23 particular than we have here in the -- in the case of
15:19:17 24 these temporary regulations with respect to Kansas.

15:19:20 25 So, there clearly is, we believe, a showing

15:19:24 1 of irreparable harm on behalf of the plaintiffs and the
15:19:28 2 doctors and their patients, and that's balanced against
15:19:31 3 any harm to the state in continuing things the way they
15:19:35 4 are, continuing the status quo.

15:19:37 5 And we submit that there really is no -- no
15:19:41 6 injury to the state whatsoever in continuing things the
15:19:44 7 way they were. The facilities are all ready regulated.
15:19:48 8 They're regulated like any other facility that provides
15:19:51 9 surgical procedures at a doctor's office under the
15:19:56 10 standards developed by the Kansas Board of Healing Arts.
15:19:59 11 They have been in compliance with those standards,
15:20:01 12 they've been performing procedures like this at their
15:20:04 13 office for over 24 years. If the injunction is put in
15:20:07 14 place, they will still be subject to those regulations
15:20:10 15 by the board of healing arts, and still be subject to
15:20:13 16 those inspections and still be subject to the high
15:20:16 17 standards of medical care for women that those standards
15:20:19 18 impose on all providers of surgical procedures in a
15:20:23 19 doctor's office. This is -- this has been going on for
15:20:27 20 eight years. They've had no issues with that. And they
15:20:31 21 will continue to have that oversight by the Kansas Board
15:20:36 22 of Healing Arts if this injunction is granted. So,
15:20:41 23 there is really no detriment to the state.

15:20:44 24 On the other hand, the detriment to the
15:20:45 25 doctors both in having to shut down that part of their

15:20:49 1 practice, to lose the revenue from that part of their
15:20:52 2 practice, to lose patients, and in the patients
15:20:56 3 themselves from their inability to access these
15:20:58 4 services, is -- is very much impacted. And the fact
15:21:02 5 that there's one abortion provider that's licensed in
15:21:09 6 the state of Kansas is not sufficient to meet the needs
15:21:11 7 of those women, and to in effect spirit away the undue
15:21:15 8 burden, Doctors -- Doctor Hodes and Nauser perform some
15:21:20 9 25 percent of the abortions in the state of Kansas.
15:21:23 10 It's -- it is really -- it's imaginary -- it's -- it's
15:21:29 11 imaginary to presume that the women who otherwise were
15:21:32 12 treated by them can simply go to Planned Parenthood just
15:21:36 13 as it would be if -- as we said in our briefs, if there
15:21:39 14 was only -- if you had three hospitals, and went down to
15:21:41 15 one hospital, and said, well, that's fine, because
15:21:43 16 everybody who went to the other two hospitals can just
15:21:45 17 go to the first one. There simply isn't enough --
15:21:49 18 enough, there aren't enough providers, and there simply
15:21:53 19 isn't the expertise at the Planned Parenthood facility
15:21:57 20 for some of the more serious complications that Doctors
15:22:00 21 Hodes and Nauser treat.

15:22:01 22 So, the fact that there's one -- one
15:22:04 23 facility left in the state that's licensed does not take
15:22:07 24 away either the -- does not take away the undue burden
15:22:10 25 for -- for women who are seeking these procedures. So,

15:22:16 1 it's clear that there's irreparable harm to the doctors
15:22:19 2 and to their patients. It's clear that there is not any
15:22:25 3 sort of irreparable harm to the state. Status quo will
15:22:28 4 be maintained. They'll be able to regulate these
15:22:32 5 providers just as they have been doing, and in the --
15:22:35 6 they'll have -- they can go through the regular
15:22:37 7 licensing process and -- and develop what happens there.

15:22:42 8 There's no medical emergency, no health
15:22:46 9 emergency that mandates that these regulations have to
15:22:49 10 go into effect on July 1st as they're currently drafted.
15:22:52 11 There's no reason to believe that they should go into
15:22:55 12 effect without waivers.

15:22:57 13 And there's -- then there's the public
15:23:00 14 interests, and as we've just cited to the court, there's
15:23:02 15 ample interest in the public in having these -- this
15:23:06 16 facility open to the public so that they can obtain
15:23:10 17 abortion procedures there. Abortion is a lawful
15:23:14 18 procedure. And -- and these doctors are highly
15:23:18 19 experienced doctors that provide sophisticated services
15:23:21 20 to some women with the most serious complications that
15:23:26 21 require abortions.

15:23:29 22 Finally, likelihood of success. Clearly, I
15:23:33 23 don't see how there can be any question that there is --
15:23:36 24 that they're likely to prevail on their due process
15:23:42 25 claim. And again, we would draw the court's attention

15:23:45 1 to Judge Smith's opinion in the Planned Parenthood case
15:23:49 2 in the Western District of Missouri where he clearly
15:23:52 3 found that there -- the same kind of thing, where there
15:23:54 4 were no waivers implemented, very strict -- very strict
15:23:58 5 physical plan requirements implemented with no
15:24:01 6 opportunity for waivers and no ample time-frame to meet
15:24:05 7 those, that that was an infringement on the plaintiff's
15:24:10 8 due process, and that he believed it likely that -- that
15:24:14 9 those statute -- those regulations would be
15:24:16 10 unconstitutional under the due process clause.

15:24:20 11 Finally, there is the likelihood of success,
15:24:25 12 the merits of undue burden, and it was -- as we've just
15:24:28 13 outlined, there is an undue burden both to the plaintiff
15:24:30 14 doctors and to plaintiffs seeking abortion in the state
15:24:33 15 of Kansas if these regulations are not enjoined.

15:24:37 16 I'm going to turn my time over now to
15:24:39 17 intervenors to -- to take a -- to explain to the court
15:24:46 18 their position and how it might differ from ours, but we
15:24:49 19 are respectfully asking this court to enter -- to enter
15:24:52 20 injunctive relief, enjoining the licensing process and
15:24:56 21 the temporary regulations currently promulgated under
15:25:00 22 Senate Bill 36. Thank you.

15:25:07 23 MS. PILATE: Thank you, Your Honor. I will
15:25:10 24 be fairly brief. I'd like to say at the outset that we
15:25:13 25 would like to adopt and incorporate into our argument

15:25:18 1 all of the arguments so ably made by Miss Woody and her
15:25:23 2 co-counsel both in their pleadings and in the oral
15:25:26 3 argument. Your Honor, I'd like to say at the outset
15:25:33 4 that my clients are concerned about the health and
15:25:38 5 safety of women, but that's not what these regulations
15:25:42 6 are about. If these regulations were about the health
15:25:46 7 and safety of women, they might contain something to
15:25:51 8 address the one part of the process where this very
15:25:56 9 vulnerable population that my clinic serves might suffer
15:26:01 10 some harm, which is between the parking lot and the
15:26:04 11 front door. And it is during that passage when they
15:26:08 12 suffer the screamers, the shouters, the hecklers who are
15:26:13 13 saying things that I won't repeat. But when they make
15:26:16 14 it to the clinic, that is their safe place. It is the
15:26:21 15 parking lot to the front door that poses the risk, not
15:26:25 16 the clinic. Your Honor, my client is the only provider
15:26:33 17 in Wyandotte County. They serve a vulnerable
15:26:36 18 under-served population that needs access to affordable
15:26:42 19 services. These regulations, like so many decisions by
15:26:48 20 governments, business, and other entities fall most
15:26:54 21 heavily and burden the most poor women. The vast
15:26:59 22 majority, between 90 and 95 percent of the people that
15:27:04 23 my clinic serves are poor women. A good half, maybe a
15:27:08 24 little bit more are African American and Latino. The
15:27:13 25 Latino part is very important, because my clinic has

15:27:16 1 three bilingual staff members, and as far as I know, it
15:27:21 2 is the only place where many members of the Latino
15:27:27 3 population feel like they can communicate and feel
15:27:32 4 comfortable. Our clinic does only first trimester
15:27:36 5 abortions. It is set up to do a very simple, frankly,
15:27:42 6 medical procedure that does not take much time. Many of
15:27:45 7 the regulations are simply inapplicable to our clinic.
15:27:49 8 And so, we would ask the court to take that into account
15:27:53 9 as well. Your Honor, abortions have been safely
15:27:56 10 performed in the building at 7th and Central for
15:27:59 11 21 years. The time line that has been set up in this
15:28:02 12 case is absurd. The final regulations were received on
15:28:09 13 June 20th, and compliance in full was expected by
15:28:13 14 July 1st. Frankly, Your Honor, that would require the
15:28:16 15 skills of a magician, and what my clinic has is a
15:28:20 16 dedicated staff, a registered nurse, and a very
15:28:24 17 dedicated physician. There are no magicians there. So,
15:28:29 18 Your Honor, we respectfully request that you enter the
15:28:34 19 emergency relief requested, and that these clinics and
15:28:41 20 other providers are able to continue providing this very
15:28:45 21 necessary service to the women of Kansas. Again, we
15:28:50 22 don't believe this has anything to do with the health
15:28:53 23 and safety. There has been no time to comply. My
15:28:57 24 client desires to comply, frankly, and was denied even
15:29:01 25 an inspection.

15:29:02 1 Your Honor, I will draw your attention to
15:29:04 2 one fact that we are addressing rapidly. The statute
15:29:08 3 requires the physician to have clinical privileges at a
15:29:12 4 hospital within 30 miles. We anticipate that that issue
15:29:15 5 is going to be resolved within days, perhaps within, you
15:29:19 6 know, the next week or so. We've been working very hard
15:29:22 7 on that. There has been no more need for our physician
15:29:25 8 to have clinical privileges at a hospital than a
15:29:29 9 dermatologist who treats teen-age acne, but we are
15:29:33 10 complying with that, don't seek to litigate that, and do
15:29:38 11 seek Your Honor's order as requested. Thank you.

15:29:50 12 THE COURT: At this time, Mr. Chanay, on
15:29:52 13 behalf of -- Mr. Fabert?

15:29:55 14 MR. CHANAY: Mr. Fabert will be arguing.

15:29:57 15 THE COURT: Mr. Fabert.

15:29:59 16 MR. FABERT: Thank you, Your Honor. I want
15:30:08 17 to distinguish here today the statute and the
15:30:15 18 regulations. As I understand their motion and the
15:30:18 19 argument, the challenge is to the regulations, but there
15:30:21 20 is no challenge being made to the statute. I don't read
15:30:31 21 the statute the same way the plaintiffs do. And I'm not
15:30:35 22 sure I read the primary case that they rely on the same
15:30:38 23 way either. We have a statute here whose most important
15:30:43 24 provision is the Statute Seven that relates to the
15:30:47 25 limitation on lawfully performed abortions. It starts

15:30:52 1 with an exemption for all true medical emergencies. If
15:30:58 2 we have any women who are suffering from true medical
15:31:02 3 emergency, those abortions can go forward unregulated
15:31:06 4 without the requirement of the license for the facility.
15:31:12 5 The statute creates a regimen of facilities licensing.
15:31:18 6 That is different from the board of healing arts which
15:31:22 7 has regulatory authority over physicians, and which
15:31:26 8 regulates the conduct of the doctors. The facilities
15:31:30 9 are going to have separate licensing, and separate
15:31:35 10 oversight by the department of health and environment.
15:31:38 11 And that's why it misses the point to talk about the
15:31:43 12 extent to which the doctors are all ready subject to
15:31:46 13 regulations by the board of healing arts. They always
15:31:50 14 have been subject to regulation by the board of healing
15:31:52 15 arts. They're going to continue to be subject to that
15:31:54 16 regulation. Those regulations and that agency have
15:31:58 17 nothing to do with overseeing the facilities. It just
15:32:03 18 so happens, coincidentally, the plaintiffs in this case
15:32:07 19 are both the physicians who perform the abortions and
15:32:10 20 the owners of the facilities. That could be otherwise.
15:32:14 21 We could have a circumstance where a new applicant for
15:32:19 22 licensing does not have the coincidence where the
15:32:24 23 physicians performing the abortion are also the owners
15:32:26 24 and operators of the facility. The regulations that
15:32:31 25 have to be adopted by the department of health and

15:32:34 1 environment have to address not just the specialized
15:32:39 2 concerns of these plaintiffs, they have to also address
15:32:44 3 the issue of any and all future applicant for licensing
15:32:48 4 under the statute. We need sufficiently explicit,
15:32:53 5 clear, understandable regulations that can be complied
15:32:57 6 with not just by these individuals but also by all
15:33:01 7 future applicants. We are, of course, caught coming and
15:33:06 8 going between a potential objection that the regulations
15:33:10 9 are too vague and objection that the regulations are too
15:33:15 10 specific. If the regulations did not include
15:33:20 11 definitions of what the facilities ought to look like,
15:33:22 12 they would be challenged as unreasonably vague. Because
15:33:28 13 the temporary regulations do specify what the facilities
15:33:31 14 ought to look like, they're now challenged as being too
15:33:34 15 specific. I think the fact that these plaintiffs are
15:33:39 16 not pursuing their administrative remedies in front of
15:33:44 17 the KDHE is proof that the real grievance here is
15:33:49 18 against the statute, not against the regulations. There
15:33:53 19 is no grievance that arises from the lack of sufficient
15:34:00 20 time to comply with this statute. They do not want to
15:34:04 21 comply with the statute ever. They do not want
15:34:08 22 additional time to comply with the statute. They want
15:34:12 23 to be permanently relieved of the obligation ever to
15:34:16 24 comply with the statute. That is something the
15:34:20 25 department of health and environment cannot do for them

15:34:23 1 under any circumstances.

15:34:28 2 There is no fair reading of this statute
15:34:31 3 that would authorize the department of health and
15:34:34 4 environment to create out of thin air a process for
15:34:37 5 granting case by case exceptions and waivers. No such
15:34:42 6 waiver provision has been included in the statute. And
15:34:46 7 for that reason, you can't criticize KDHE for failing to
15:34:50 8 grant waivers and exception. The ultimate question,
15:34:55 9 because we are in US District Court and the state of
15:34:59 10 Kansas is the defendant, is whether there is a
15:35:02 11 constitutional violation, not merely is there an
15:35:08 12 arguable harm that could be addressed in a court case.
15:35:12 13 Court does not have jurisdiction to award tort damages
15:35:14 14 under the Eleventh Amendment. We're here solely for
15:35:19 15 injunctive relief consistent with the Eleventh
15:35:23 16 Amendment, and the question is whether the state is
15:35:26 17 acting unconstitutionally, enacting and enforcing this
15:35:32 18 statute.

15:35:33 19 Now, as I read the Planned Parenthood versus
15:35:38 20 Drummond case, the Missouri case that's been relied on,
15:35:43 21 Judge Smith specifically held that he believed those
15:35:46 22 plaintiffs would fail in their facial challenge to the
15:35:51 23 statute. That statute required all abortion providers
15:35:56 24 in the state of Missouri to comply with the standard for
15:36:00 25 ambulatory surgical centers. I'm looking at the

15:36:09 1 September 24, 2007 decision in that case, 2007 Westlaw
15:36:15 2 2811407. The fourth page of that opinion states, the
15:36:22 3 court holds that PPK does not have a probability of
15:36:28 4 success of establishing these facial claims. It goes on
15:36:34 5 further to say, for plaintiffs to succeed, the court
15:36:36 6 would have to determine the statute, and intended
15:36:40 7 regulations cannot be justified as a legitimate health
15:36:43 8 or safety measure. The court does not believe
15:36:46 9 plaintiffs will carry their heavy burden. Further into
15:36:50 10 that opinion, the judge pointed out that it is
15:36:54 11 reasonable to have regulations that require all
15:36:59 12 facilities where surgery is performed to abide by the
15:37:03 13 same regulations. What we're really here today about is
15:37:09 14 an argument that these plaintiffs are entitled to a
15:37:13 15 grandfather provision that is not in the statute, that
15:37:17 16 they are constitutionally entitled to a grandfather
15:37:19 17 provision that tells them that they are never, ever
15:37:23 18 going to be required to comply with current law, that
15:37:27 19 the law cannot be updated in any way that would restrict
15:37:32 20 their ability to keep performing their day to day
15:37:35 21 activities in the way they've been accustomed to.
15:37:39 22 Kansas law has never recognized a right protected by law
15:37:45 23 to perform medicine the way these plaintiffs have been
15:37:48 24 performing it. To the extent they've been lawfully
15:37:52 25 performing it, that's been primarily as a result of

15:37:54 1 judicial decisions that restrict past statutes that made
15:37:59 2 abortion illegal. We don't have a protected property
15:38:04 3 interest here in the business that these plaintiffs are
15:38:08 4 engaging in. They do not have existing licenses that
15:38:11 5 tell them that they have a -- a state guaranteed right
15:38:15 6 to engage in the business of providing abortions. The
15:38:24 7 state of Kansas does have the right to regulate
15:38:26 8 abortions. Judge Smith noted that in his decision.

15:38:30 9 The only question is whether they're going
15:38:33 10 to regulate abortions under a uniform rule applicable
15:38:37 11 both to these plaintiffs and to ambulatory surgical
15:38:41 12 centers, or whether instead, this court is going to
15:38:44 13 compel the state to create exceptions that apply only to
15:38:51 14 these plaintiffs and to no one else, to let them operate
15:38:53 15 the way they want to, free of all oversight and
15:38:58 16 regulation of the way their facilities are structured,
15:39:01 17 maintained and operated.

15:39:06 18 The standard for a temporary injunction, the
15:39:10 19 standard for temporary restraining order require there
15:39:15 20 to be a finding of irreparable harm, not just some harm,
15:39:18 21 but irreparable harm. The statute says that all medical
15:39:23 22 emergencies can go forward unlicensed. Statute also
15:39:27 23 says that unlicensed facilities can perform five first
15:39:33 24 trimester abortions every month without transgressing
15:39:36 25 the regulations or the statute. I think I have a

15:39:40 1 different idea of what irreparable harm is than the
15:39:43 2 plaintiffs have put forward. It is not enough to show
15:39:48 3 that there is some harm. The harm must be a harm that
15:39:53 4 cannot be remedied in any other way other than the
15:39:57 5 issuance of the temporary restraining order, and that
15:40:01 6 simply is not true in this case.

15:40:04 7 We cited the court to the case of State, ex
15:40:08 8 rel, Schneider versus Liggett. One of the key holdings
15:40:11 9 of that case from 1976 was the Kansas administrative
15:40:15 10 agencies have no jurisdiction to decide constitutional
15:40:18 11 challenges. The constitutional challenges must be
15:40:21 12 brought for the first time when an administrative case
15:40:25 13 has first been transferred to the district court on
15:40:27 14 appeal. That's what ought to be done in this case.
15:40:31 15 These plaintiffs should proceed to exhaust their
15:40:35 16 administrative remedies, and then if they don't get a
15:40:38 17 license, they should appeal to the district court. The
15:40:44 18 district court can then entertain their constitutional
15:40:46 19 challenges and decide whether this statute needs to have
15:40:52 20 a grandfather clause read into it in order to comply
15:40:55 21 with due process. KDHE cannot do that for them. It
15:41:00 22 lacks the authority to do it.

15:41:07 23 I have never heard of a regulated industry
15:41:13 24 being granted a due process right to craft the
15:41:17 25 regulations that apply to them, which is what I see in

15:41:21 1 the motion, that due process would require that these
15:41:25 2 regulations actually result from a meet and confer of
15:41:31 3 some kind with the regulated businesses. That is not my
15:41:35 4 understanding of due process. Due process comes when
15:41:44 5 the protected interest, whether it's the liberty
15:41:47 6 interest or property interest, is threatened, or the
15:41:50 7 government takes action, the government affords due
15:41:54 8 process at that time.

15:41:56 9 The government does not afford due process
15:41:58 10 to everyone by inviting their lobbyists into the
15:42:03 11 legislative process. That is not where due process
15:42:06 12 applies. Likewise, due process does not mandate that
15:42:11 13 there be a -- a prior comment period before a regulation
15:42:16 14 is made effective. I see no evidence whatever to
15:42:28 15 support the contention that either the statute or the
15:42:32 16 regulation was designed to make access more difficult.
15:42:37 17 In fact, the reply brief that was filed today agrees
15:42:42 18 with my own reading of the statute that the real purpose
15:42:46 19 is to try to bring all abortion clinics under a single
15:42:50 20 standard of professionalism, that being the standard of
15:42:55 21 professionalism historically present in ambulatory
15:42:59 22 surgical centers. If there is no medical emergency in
15:43:09 23 this case, there is no irreparable harm. If there were
15:43:18 24 a true medical emergency, the statute would not even
15:43:21 25 apply.

15:43:29 1 This statute, these regulations, have
15:43:33 2 nothing whatever to do with abortion protesters at all.
15:43:38 3 The fact that this statute does not address that
15:43:42 4 completely distinct and separate subject has nothing to
15:43:45 5 do with the lawfulness of these regulations. I think if
15:44:00 6 the purpose here is to avoid any potential risk of
15:44:04 7 prosecution for violation of the statute, we're probably
15:44:09 8 missing at least one party. That would, I assume, be
15:44:13 9 the prosecutor in Wyandotte County. But again, I don't
15:44:19 10 really think that that's why we're here today. What
15:44:22 11 we're here today is to address whether the department of
15:44:25 12 health and environment ought to be restrained and
15:44:28 13 prevented from going forward with the administrative
15:44:30 14 process of hearing the administrative appeal from denial
15:44:35 15 of the application for permits. I think that would be a
15:44:39 16 mistake. I think it would be an unnecessary
15:44:42 17 complication in the procedural posture of this case. I
15:44:46 18 think the right thing to do is not to restrain the
15:44:51 19 department of health and environment, to go ahead and
15:44:55 20 have the appeals prosecuted in the normal course so that
15:44:59 21 we can see what the outcome of those administrative
15:45:02 22 appeals are. Then whichever party feels aggrieved by
15:45:08 23 the outcome of the administrative appeal can pursue
15:45:12 24 additional relief in the district court, presumably the
15:45:17 25 District Court of Shawnee County, and at that time,

15:45:21 1 constitutional challenges to the interpretation and
15:45:23 2 application of the statute can properly be raised, and
15:45:27 3 the court can hear what a Kansas judge thinks this
15:45:32 4 statute really means.

15:45:37 5 If I read the -- the factual materials
15:45:42 6 correctly, I think the witnesses that are being offered
15:45:46 7 in support of this motion are in agreement with me. If
15:45:49 8 I read the contractor's affidavit, it's the first
15:45:53 9 attachment, the contractor says he's looked at the
15:45:56 10 regulations, and they -- he says these regulations
15:45:59 11 appear to him to be perfectly ordinary and normal
15:46:03 12 requirements for an ambulatory surgical center. He
15:46:09 13 said, that's right. That's -- that means they've done
15:46:12 14 their job correctly. The purpose of the regulations is
15:46:16 15 essentially to bring into alignment the practice in
15:46:22 16 individual doctor's offices with the practice in
15:46:25 17 ambulatory surgical centers, that that's the level of
15:46:31 18 health care that the legislature of the state wants to
15:46:35 19 see afforded in every abortion facility operating in
15:46:40 20 this state. To the extent that is inconsistent with
15:46:48 21 operating a comparatively small doctor's office, that
15:46:54 22 grievance would have to be taken up with the Kansas
15:46:56 23 legislature, not with the department of health and
15:46:59 24 environment.

15:47:01 25 There is no way for the KDHE to draft and

15:47:05 1 adopt regulations that carry out the orders of the
15:47:10 2 Kansas legislature without having substantially what
15:47:17 3 these regulations say. If there is any wiggle room
15:47:21 4 there, I'm sure that all the proceedings in this case
15:47:24 5 will be taken into account in drafting any changes of
15:47:31 6 the permanent regulations that will take the place of
15:47:33 7 the temporary regulation. But the notion that this is
15:47:37 8 somehow a facially obvious due process violation, I
15:47:45 9 think is clearly erroneous. There is not a single case
15:47:50 10 that has been offered up here that holds that this kind
15:47:55 11 of statute and these regulations, regulations similar to
15:47:59 12 this, are due process violations. I might point out
15:48:04 13 that what the Planned Parenthood case really held was
15:48:08 14 that to the extent non-surgical abortions were being
15:48:11 15 performed in one of those plaintiffs' facilities, those
15:48:15 16 would not appropriately be subject to the same rules and
15:48:17 17 regulations as the -- the rules applicable to surgical
15:48:21 18 facilities. But in the course of that holding, Judge
15:48:25 19 Smith specifically included that everyone who performs
15:48:29 20 surgical abortions deserves to be subjected to the same
15:48:33 21 rules and regulations as every other surgical facility
15:48:37 22 in the state of Missouri.

15:48:39 23 I don't know how that case can be cited for
15:48:42 24 the proposition that there is some sort of property
15:48:46 25 right in continuing to operate a private medical office

15:48:55 1 that falls far short of the requirements of an
15:48:59 2 ambulatory surgical center as an abortion facility. We
15:49:09 3 have a lot of speculation about patients who might or
15:49:13 4 might not be allowed to go to the place they would
15:49:20 5 prefer to go for their abortion.

15:49:23 6 I am not aware of any irreparable harm that
15:49:26 7 is suffered by being required to go to an ambulatory
15:49:31 8 surgical center rather than going to a doctor's office
15:49:35 9 for an abortion. I do not know that one facility is any
15:49:42 10 more subject to the potential for screaming protesters
15:49:46 11 as opposed to the other.

15:49:52 12 The standard in the Tenth Circuit for the
15:49:56 13 issuance of temporary restraining order is plain, and it
15:50:02 14 is what we've cited the court to, the Aid for Women case
15:50:06 15 from 1996. It is not enough to just say that some
15:50:14 16 privacy interest is implicated in the enforcement of the
15:50:18 17 statute. Considerably more detailed showing is required
15:50:25 18 before the TR0 can be issued by a US District Court here
15:50:28 19 in the state of Kansas, unlike apparently, the standard
15:50:32 20 they're applying in Missouri.

15:50:36 21 We think it would be a mistake to bring to a
15:50:40 22 halt the administrative process at the state level. We
15:50:44 23 think it's extremely important that this administrative
15:50:46 24 process be allowed to play itself out. I am aware of no
15:50:50 25 threat of prosecution of any of these plaintiffs. We

15:50:55 1 have nothing from any of the interested prosecutorial
15:51:00 2 agencies suggesting that they're waiting to swoop down
15:51:03 3 on someone, close their building, arrest them and throw
15:51:06 4 them in jail. Kansas courts are perfectly competent to
15:51:14 5 address due process concerns. If there really are
15:51:19 6 grandfather clause concerns under the statute, they can
15:51:25 7 be addressed by the Shawnee County District Court. They
15:51:28 8 don't have to be addressed first and foremost here in
15:51:32 9 this court.

15:51:34 10 Without a fully developed administrative
15:51:38 11 record, we will never know whether either of the
15:51:42 12 facilities operated by these plaintiffs has any hope
15:51:45 13 ever of being licensed consistent with the statute and
15:51:49 14 the regulations. They have outlined what they consider
15:51:54 15 the reasons that they think would probably impose a
15:52:01 16 burden on them in seeking to be licensed, but we will
15:52:05 17 never know until we've seen the entire administrative
15:52:08 18 record filled out whether the real reason they don't
15:52:13 19 have a license issued, assuming there is no license
15:52:18 20 issued, is because they didn't have enough time, or
15:52:21 21 whether instead, their grievance is that no matter how
15:52:24 22 much time they're allowed, they have no intention of
15:52:27 23 complying with the statute.

15:52:34 24 I'd like to see this case resolved in as
15:52:39 25 expeditious and final a way as possible, I think it

15:52:42 1 would be a mistake to shut down the administrative
15:52:45 2 process prematurely, and that's why I think that because
15:52:50 3 there is no threat of eminent enforcement, no one is
15:52:55 4 being threatened with going to jail, medical emergencies
15:52:59 5 are all ready addressed in the statute, we do not have
15:53:05 6 any reason to believe that irreparable harm will follow
15:53:09 7 if we let the administrative process play out, that
15:53:12 8 that's the right course. And if expedited hearings are
15:53:16 9 needed, all plaintiffs need do is ask for them. We have
15:53:20 10 a highly cooperative office of administrative hearings,
15:53:23 11 and we can do what it takes to get the issues resolved
15:53:29 12 as quickly as possible, and then come back to this
15:53:32 13 court, if necessary, with a fully developed
15:53:35 14 administrative record. Thank you.

15:53:39 15 THE COURT: Court had given 30 minutes per
15:53:42 16 side. In light of the time that we've used, I am going
15:53:46 17 to ask the parties if they wish, they can respond to
15:53:49 18 each other's arguments at this time. Give you some
15:53:52 19 additional time. Five minutes.

15:53:56 20 MS. WOODY: Sure. Your Honor, I just want
15:54:27 21 to address a couple of things that Mr. Fabert mentioned.
15:54:30 22 First of all, the defendants cannot prevail in this case
15:54:33 23 by mischaracterizing the plaintiff's claims. This is
15:54:35 24 not a facial challenge to the statute. This is an as
15:54:38 25 applied statute to the -- the particular way the KDHE

15:54:42 1 has implemented the licensing provisions of the act and
15:54:45 2 the temporary regulations as adopted. Secondly,
15:54:50 3 Mr. Fabert argues that there's no irreparable harm to
15:54:53 4 patients because they can simply choose another abortion
15:54:56 5 facility or they can get a medical emergency exception,
15:54:59 6 and implies somehow that the two women that we discussed
15:55:02 7 in the first part of the argument could somehow get some
15:55:04 8 kind of a waiver in that respect. But if you look at
15:55:07 9 the statute, it says only where there's -- the woman is
15:55:10 10 in danger of eminent death or impairment of a major
15:55:14 11 bodily function could she get a waiver for an emergency
15:55:19 12 abortion.

15:55:20 13 In this instance, these abortions are
15:55:22 14 medically indicated, but would not fall within the
15:55:25 15 definition of the regulations, and therefore, would not
15:55:30 16 be able to -- she would not able to get an abortion --
15:55:38 17 would not be able to get an abortion on a medical
15:55:40 18 emergency basis.

15:55:43 19 I want to take issue with the idea that the
15:55:45 20 board of healing arts does not regulate the facilities.
15:55:48 21 As the court looks at the chart that we've given the
15:55:51 22 court, clearly it does. That's the reason for the
15:55:53 23 inspections coming out. If you look at the -- for
15:55:56 24 instance, at the issue of procedure room size, you can
15:55:58 25 see that the procedure room size is spoken to in the

15:56:03 1 Kansas regulations for office space surgery. It is, of
15:56:06 2 course, not nearly as stringent as the 150 square feet
15:56:09 3 requirement that's in the -- the temporary regulations,
15:56:12 4 but nor is that as stringent as -- nor is the one for
15:56:18 5 hospitals as stringent. There's nothing about that
15:56:21 6 regulation that is appropriate in this case, and there's
15:56:24 7 nothing that would mandate such a regulation in light of
15:56:28 8 the other regulations specifically for office space
15:56:31 9 surgeries.

15:56:32 10 With respect to the argument that there's no
15:56:38 11 due process argument here, and that we should go through
15:56:41 12 the administrative route, it is the court's obligation
15:56:44 13 to address the constitutional issues under due process.
15:56:48 14 The idea that the plaintiffs here are seeking some
15:56:51 15 special treatment is not -- is not true. Here you have
15:56:54 16 regulations that were adopted that gave the providers
15:56:59 17 nine days to come in compliance with regulations that
15:57:02 18 would have totally meant total remodeling of their
15:57:06 19 facilities. There is no due process in that. The
15:57:09 20 regular -- the regular procedure for adopting
15:57:12 21 regulations, with public comment going forward with
15:57:17 22 that, and then having permanent regulations entered at
15:57:21 23 some time in the future, that's the regulations that we
15:57:24 24 are asking the court to have the Kansas -- the state of
15:57:27 25 Kansas follow, not that they adopt some temporary

15:57:30 1 regulations that in effect shut these folks down.

15:57:34 2 There is irreparable harm to the doctors.

15:57:36 3 If you look at Judge Smith's opinion, he clearly says

15:57:39 4 that because of the Eleventh Amendment, as it's stated

15:57:41 5 -- as stated, they don't have an opportunity to come in

15:57:44 6 here for tort damages. So, for instance, any lost

15:57:47 7 revenues to the -- to the doctors are irreparable harm

15:57:50 8 because they can never recoup those while they go

15:57:53 9 through the administrative procedures that the state is

15:57:55 10 talking about. So, clearly there is irreparable harm

15:57:58 11 there. There clearly is irreparable harm to women

15:58:02 12 seeking abortions and access to abortions in this state

15:58:05 13 by way of the temporary regulations. And as we've said,

15:58:08 14 there is absolutely no reason for the court to let

15:58:14 15 them -- to not give injunction in this case and let the

15:58:17 16 case go forward, if there is any other information the

15:58:20 17 court needs, that it will be developed throughout --

15:58:23 18 throughout this procedure, it's clear, and plaintiff

15:58:27 19 stated in their brief, this court has discretion to

15:58:31 20 enter injunctive relief when it's appropriate. If ever

15:58:35 21 there was a case where injunctive relief is appropriate,

15:58:37 22 where the state should be restrained from enforcing

15:58:41 23 these temporary regulations in nine days when it's

15:58:46 24 impossible for the plaintiffs to comply, this is such a

15:58:49 25 case. If you look at Judge Smith's opinion, it doesn't

15:58:52 1 say what the state said. There, he found that the same
15:58:55 2 kinds of regulations, the same kinds of restrictions,
15:58:59 3 because they didn't provide for ample time for the
15:59:01 4 plaintiffs to comply and because they didn't provide for
15:59:06 5 an opportunity for them to seek waivers, likely would be
15:59:10 6 unconstitutional.

15:59:10 7 There's no difference between the
15:59:12 8 regulations at issue here and those that were at issue
15:59:16 9 in front of the Western District of Missouri with
15:59:18 10 respect to the -- the constitutionality of those --
15:59:23 11 those issues.

15:59:23 12 Clearly, we believe that there is likelihood
15:59:27 13 of success on both the due process and the undue burden
15:59:30 14 issues, and we respectfully request that the court grant
15:59:33 15 injunctive relief.

15:59:35 16 THE COURT: Mr. Fabert?

15:59:38 17 MR. FABERT: Well, I just want to address
15:59:51 18 this notion that we are mischaracterizing the relief
15:59:54 19 that was being requested here. Umm, the relief that's
15:59:59 20 being requested here is permanent, permanent,
16:00:05 21 non-enforcement of the statute. Plaintiffs are not
16:00:09 22 asking for a schedule, for a reasonable length of time
16:00:14 23 for the KDHE to tell them exactly what they need to do
16:00:18 24 to come into compliance and to get licenses. They have
16:00:22 25 made it very plain that the reason they consider their

16:00:24 1 harm to be irreparable is the fact that they cannot
16:00:28 2 under any reasonable circumstances comply with any
16:00:32 3 anticipated version of the regulations. This nine day
16:00:37 4 argument is, therefore, a red herring. We could have
16:00:40 5 given them nine months, and their objection would be
16:00:43 6 identical.

16:00:44 7 They do not care how much time they're
16:00:47 8 allowed. They do not want to come into compliance ever.
16:00:52 9 They want this court to tell them they don't ever have
16:00:54 10 to remodel their facilities to make them look more like
16:00:59 11 an ambulatory surgical center.

16:01:07 12 The only reason -- the only reason damages
16:01:11 13 are not available is because these plaintiffs have
16:01:14 14 chosen the forum of US District Court. If they thought
16:01:18 15 they needed a money damages remedy, all they needed to
16:01:22 16 do was to start the proceedings in state court, because
16:01:25 17 there is no Eleventh Amendment immunity in state court.
16:01:29 18 It is their decision to choose this forum of limited
16:01:33 19 jurisdiction that limits the extent of their remedy, not
16:01:38 20 anything the state has done.

16:01:42 21 Once more, if the issue is the regulations
16:01:46 22 and the behavior of the Kansas Department of Health and
16:01:49 23 Environment, there can be no criticism of their conduct.
16:01:55 24 It is not due process for them to overstep the authority
16:01:59 25 entrusted them by the legislature of the state of

16:02:02 1 Kansas. They have no power to grant waivers. They have
16:02:04 2 no power to grant grandfather clauses. They have no
16:02:10 3 power to entertain constitutional challenges to this
16:02:13 4 statute. Only the District Court of Shawnee County can
16:02:18 5 entertain the constitutional challenges in the first
16:02:22 6 instance. That is what needs to occur here to give
16:02:25 7 these plaintiffs all the remedy that they're entitled
16:02:29 8 to, and the sooner we reach that point, then they will
16:02:33 9 get all the remedy the law will ever allow them. Thank
16:02:38 10 you.

16:02:41 11 THE COURT: What the court would like to do
16:02:43 12 at this time is then -- appreciate the parties
16:02:46 13 accommodating the court's schedule -- if I could take a
16:02:49 14 recess to consider the arguments that have been made
16:02:51 15 this afternoon, and then return and give you the court's
16:02:55 16 ruling. Thank you.

16:02:56 17 (Whereupon court took a recess. Proceedings
16:38:36 18 then continued as follows:)

16:38:36 19 THE COURT: We're back on the record. I
16:38:59 20 want to thank the parties, counsel, for again
16:39:02 21 accommodating the court in regards to our schedule for
16:39:07 22 this afternoon, and also in regards to the expedited
16:39:13 23 briefing that the court made a request of the parties.
16:39:16 24 So, thank you for that. As I begin with the court's
16:39:20 25 ruling, I will mention this for the record. We're at a

16:39:27 1 very early stage of these proceedings. The record has
16:39:31 2 not been fully developed, and what is before the court
16:39:37 3 is a request for preliminary relief. The court has
16:39:44 4 reviewed the briefs, the evidence, and the relevant law.
16:39:49 5 Court has heard the parties' arguments, and again, is
16:39:52 6 now prepared to rule. I'd ask the parties to follow
16:39:57 7 along. This will take me a little while here to get
16:40:01 8 through.

16:40:02 9 To begin with, because defendants had notice
16:40:05 10 of this hearing, filed written arguments and authorities
16:40:10 11 regarding their position and are present, the court will
16:40:16 12 consider plaintiff's motion which was entitled motion
16:40:19 13 for a temporary restraining order and/or preliminary
16:40:24 14 injunction, the court will consider it as one for a
16:40:28 15 preliminary injunction.

16:40:30 16 The purpose of a preliminary injunction is
16:40:32 17 to maintain the status quo pending the outcome of the
16:40:37 18 case. Plaintiffs as the parties seeking the preliminary
16:40:42 19 injunction bear the burden to establish, number one, a
16:40:45 20 substantial likelihood of prevailing on the merits.
16:40:49 21 Number two, irreparable harm unless the injunction is
16:40:53 22 issued. Number three, the threatened injury outweighs
16:40:57 23 the harm that the injunction may cause the opposing
16:41:03 24 party. And number four, an injunction, if issued, will
16:41:07 25 not adversely affect the public interest.

16:41:11 1 First, the court looks at the likelihood
16:41:13 2 that plaintiffs will succeed on the merits of their
16:41:15 3 claims. Plaintiffs base their injunction request on
16:41:21 4 their claims that defendants violated plaintiffs'
16:41:24 5 procedural and substantive due process rights and their
16:41:30 6 patient's right to privacy. To succeed on the
16:41:34 7 procedural due process claim under the Fourteenth
16:41:38 8 Amendment, plaintiffs must establish that they possessed
16:41:43 9 a protected interest such that the due process
16:41:46 10 protections were applicable. If they make such showing,
16:41:50 11 then they must show that they were not afforded an
16:41:53 12 appropriate level of process. It's a case of Farthing
16:41:58 13 versus City of Shawnee at 39 Fed 3rd 1131, an 1135, a
16:42:04 14 Tenth Circuit case from 1994. Plaintiffs argue they
16:42:09 15 have a property and liberty interest in the continued
16:42:12 16 operation of their medical practice. The right to
16:42:16 17 pursue a lawful business has long been recognized as a
16:42:20 18 property right within the protection of the Fourteenth
16:42:22 19 Amendment. Plaintiffs have provided evidence that their
16:42:26 20 medical practice has been in operation, that they have
16:42:29 21 been providing abortion services for approximately
16:42:32 22 24 years. Based on the record presented, it appears
16:42:38 23 plaintiffs have a protected interest in maintaining
16:42:41 24 their business. Procedural due process requires notice
16:42:45 25 and a pre-deprivation hearing before property interests

16:42:51 1 are negatively affected by governmental actors. At this
16:42:55 2 stage of the litigation, plaintiffs have also provided
16:43:00 3 the court with evidence to suggest that defendants did
16:43:02 4 not afford them an appropriate level of process
16:43:06 5 implementing the temporary regulations and licensing
16:43:11 6 process. On the record presented, it appears defendants
16:43:17 7 failed to provide plaintiffs with, arguably, any
16:43:21 8 process, let alone adequate process. According to the
16:43:25 9 record presented, plaintiffs wrote to KDHE regarding the
16:43:31 10 act on May 17th, 2011, the day after the act was
16:43:37 11 enacted. KDHE responded on May 26th, informing
16:43:43 12 plaintiffs that the new regulations and licenses would
16:43:47 13 become effective July 1st, which is today's date.
16:43:52 14 Plaintiffs did not receive regulations until June 9th
16:43:56 15 when they were given until Friday, June 17th to become
16:44:00 16 familiar with the regulations, confirm compliance, and
16:44:06 17 apply for a license. After the close of business on
16:44:10 18 June 17th, KDHE sent plaintiffs a copy of the final
16:44:14 19 temporary regulations and licensing process. These
16:44:20 20 regulations imposed more, arguably, onerous requirements
16:44:27 21 than the June 9th draft regulations. Plaintiffs asked
16:44:34 22 for waivers, but were told no waivers would be given.
16:44:40 23 There's no evidence in the record that plaintiffs were
16:44:42 24 provided a meaningful notice or opportunity to be heard
16:44:47 25 or give comment on the regulations. In addition to

16:44:51 1 guaranteeing fair procedures, the due process clause of
16:44:54 2 the Fourteenth Amendment, quote, covers a substantive
16:44:58 3 sphere as well, barring certain government actions,
16:45:01 4 regardless of the fairness of the procedures used to
16:45:04 5 implement them, end quote, case of Diaz versus City and
16:45:09 6 County of Denver at 567 Fed 3rd 1169, at 1181, a Tenth
16:45:16 7 Circuit case from 2009 which is quoting County of
16:45:21 8 Sacramento versus Lewis at 523 U S 833 at 845, 1998
16:45:26 9 Supreme Court case. In this case, the legislative
16:45:31 10 enactment is required to bear a rational relation to the
16:45:34 11 legitimate government interest. Plaintiffs argue the
16:45:38 12 temporary regulations and licensing process requirements
16:45:42 13 are medically unnecessary, unattainable and harmful to
16:45:47 14 public health. Plaintiffs further argue that defendants
16:45:50 15 have violated their substantive due process rights by
16:45:53 16 implementing the requirements in a manner that prohibits
16:45:57 17 plaintiffs from continuing to provide abortion services
16:46:00 18 unless they meet onerous standards on a short amount of
16:46:04 19 time. Plaintiffs contend number one, there's no medical
16:46:08 20 need for the physical facility requirements; number two,
16:46:13 21 it's impossible for them to comply with the physical
16:46:16 22 facility requirements in time to obtain a license before
16:46:21 23 the effective date of the act; number three, the
16:46:24 24 physical facility requirements directly undermine public
16:46:28 25 health by substantially impeding access to a lawful and

16:46:33 1 necessary medical procedure. Through affidavits,
16:46:38 2 plaintiffs have presented evidence that the temporary
16:46:41 3 regulations and licensing process requirements regarding
16:46:45 4 the physical facilities where abortion services are
16:46:49 5 performed are unique to those facilities, that the
16:46:52 6 regulations for facilities to handle more complex and
16:46:56 7 riskier procedures like hospitals do not contain
16:46:59 8 physical facility requirements as strict and/or onerous
16:47:04 9 as the temporary regulations and licensing process, and
16:47:09 10 that the temporary regulations and licensing process
16:47:13 11 physical facility requirements are not medically
16:47:15 12 necessary. Defendants have not presented evidence that
16:47:20 13 the additional requirements for the facilities where
16:47:23 14 abortion services are provided are rationally related to
16:47:27 15 a legitimate governmental interest. The evidence
16:47:34 16 presented to the court is sufficient at this early stage
16:47:39 17 of the proceedings to show a likelihood that plaintiffs
16:47:43 18 will succeed on the merits of their due process claims.
16:47:47 19 Because the court has found that plaintiffs have shown a
16:47:51 20 likelihood that they will succeed on the merits of their
16:47:53 21 due process claims, the court need not address
16:47:57 22 plaintiff's right to privacy claim.

16:47:59 23 The court next considers whether plaintiffs
16:48:01 24 will suffer irreparable harm if the court denies a
16:48:04 25 preliminary injunction. The irreparable harm

16:48:06 1 requirement is satisfied if plaintiff shows a
16:48:09 2 significant risk that it will experience harm that
16:48:14 3 cannot be compensated after the fact by monetary
16:48:17 4 damages. Irreparable harm can occur through loss of
16:48:21 5 customer or good will as well as threats to a business's
16:48:26 6 viability. Here, plaintiffs argue that absent an
16:48:29 7 injunction, defendants will enforce the temporary
16:48:32 8 regulations and licensing process immediately, harming
16:48:36 9 plaintiffs by number one, forcing them to shut down
16:48:38 10 their ongoing abortion services; number two, subjecting
16:48:43 11 them to loss of revenues; number three, subjecting them
16:48:46 12 to loss of future patients; and number four, damaging
16:48:50 13 the professional standing. Plaintiffs also allege, in
16:48:54 14 the absence of the requested injunction, their patients
16:48:57 15 will be exposed to unnecessary health risks. The Kansas
16:49:02 16 women will be unable to obtain abortion services in the
16:49:05 17 state and/or in a private medical office setting, and
16:49:09 18 public health will be threatened. Yesterday, KDHE
16:49:16 19 issued a one year license to Comprehensive Health of
16:49:19 20 Planned Parenthood of Kansas and Mid-Missouri, one of
16:49:23 21 only two other facilities in Kansas that provides
16:49:26 22 abortion services. Defendants argue that because
16:49:30 23 Planned Parenthood was licensed, women will still be
16:49:33 24 able to obtain abortion services in Kansas. They also
16:49:37 25 argue that plaintiffs can seek to get a license to

16:49:40 1 perform abortion services at another facility. Thus,
16:49:46 2 the defendants argue, the only remaining harm of
16:49:49 3 plaintiffs is the speculative harm that plaintiffs will
16:49:52 4 lose revenue and future clients, receive damage to the
16:49:58 5 professional standing, and that there will be a threat
16:50:00 6 to public health. Plaintiffs presented evidence that
16:50:03 7 without an injunction, they would have to cease
16:50:08 8 providing medical services today. KDHE informed
16:50:12 9 plaintiffs this morning that they would be denied a
16:50:15 10 license. They have patients scheduled to receive these
16:50:19 11 services within the next week. According to the
16:50:23 12 affidavit submitted, these services are often medically
16:50:26 13 necessary, and a delay in the services creates a health
16:50:30 14 risk for patients. There is evidence in the record of
16:50:34 15 at least two women with fetal anomalies and serious
16:50:38 16 medical complications that will suffer irreparable harm
16:50:42 17 if an injunction is not issued. At least one of the
16:50:47 18 plaintiffs performs 25 percent of these services in the
16:50:51 19 state of Kansas. One plaintiff has been licensed, but
16:50:55 20 the record indicates that that clinic does not have the
16:50:59 21 specific expertise of plaintiffs Hodes and Nauer in
16:51:06 22 performing certain complicated procedures, and is
16:51:10 23 unlikely to be able to absorb the patients of both
16:51:13 24 plaintiffs in the manner that will address the health
16:51:15 25 concerns involved with dealing with delaying the

16:51:18 1 services to patients. There's also evidence that
16:51:24 2 plaintiffs will lose revenue through future clients, and
16:51:28 3 good will, and suffer harm to their professional
16:51:31 4 reputation if they are forced to stop providing legal
16:51:35 5 medical services. Based on the record presented, the
16:51:38 6 court finds that plaintiffs have sufficiently shown that
16:51:41 7 they will suffer irreparable harm unless a temporary
16:51:45 8 restraining order is issued.

16:51:47 9 Next, the court looks at whether the
16:51:49 10 threatened injury outweighs the harm that the temporary
16:51:54 11 restraining order may cause defendants. If the court
16:51:56 12 were to issue the requested orders, defendants would be
16:51:58 13 prohibited, at least temporarily, from enforcing the
16:52:01 14 temporary regulations and licensing process. There's no
16:52:05 15 evidence that an injunction will impose any affirmative
16:52:10 16 obligations, administrative burden or cost to
16:52:13 17 defendants. The delay in enforcing the state's laws
16:52:17 18 that might result from an injunction is not as great as
16:52:20 19 the threatened harm to plaintiffs and their patients.
16:52:23 20 An injunction would not prevent the regulation of
16:52:26 21 plaintiff's medical services entirely. Plaintiffs would
16:52:30 22 remain subject to existing regulatory requirements and
16:52:34 23 government oversight. Any delay or interruption from
16:52:38 24 the issuance of an injunction will be temporary pending
16:52:42 25 the resolution of this action. The court finds that the

16:52:47 1 significance, certainty and reparability of the
16:52:52 2 threatened harm outweigh any potential harm to
16:52:56 3 defendants.

16:52:57 4 Finally, court will consider whether the
16:52:59 5 injunction, if issued, would adversely affect the public
16:53:02 6 interest. This action involves access to and regulation
16:53:06 7 of medical services that directly affect the public
16:53:09 8 interest. Although regulation of medical services is a
16:53:13 9 recognizable public interest that would be affected by
16:53:17 10 issuing the requested injunction, the court believes
16:53:20 11 that the public's interest lies in preserving the status
16:53:24 12 quo pending resolution of this case. As the court
16:53:30 13 mentioned, if an injunction is issued, plaintiffs would
16:53:33 14 remain subject to the existing regulatory requirements
16:53:36 15 and government oversight. The court finds that
16:53:40 16 restraining action on the temporary regulations and
16:53:43 17 licensing process until the merits of this action can be
16:53:48 18 resolved would not adversely affect the public interest.
16:53:52 19 As a result of considering these factors, the court
16:53:56 20 finds plaintiffs have established entitlement to the
16:54:00 21 requested preliminary injunction. Plaintiff's motion is
16:54:04 22 granted. Defendants and their agents and successors and
16:54:09 23 office are temporarily restrained from enforcing the
16:54:13 24 licensing requirements of Senate Bill Number 36, 2011
16:54:18 25 bill, at Sections 2, 8 -- 2 and 8, and also enforcing

16:54:26 1 the temporary regulations and licensing procedures until
16:54:30 2 a resolution of this action.

16:54:34 3 I would direct the parties to, in light of
16:54:37 4 the court's ruling, contact the magistrate judge
16:54:41 5 assigned to this case to request that a scheduling order
16:54:46 6 regarding this case be set as soon as possible. Based
16:54:53 7 on the court's ruling, at this time, is there any
16:54:59 8 request or argument for a bond to be issued?

16:55:09 9 MR. FABERT: If it please the court, I think
16:55:11 10 Federal Rule 65 C makes a posting of some bond
16:55:19 11 mandatory, and there is no discretion to completely
16:55:21 12 waive and dispense with the posting of a security bond.

16:55:27 13 THE COURT: Is there a request for a bond
16:55:29 14 amount?

16:55:38 15 MR. FABERT: Umm, we think a nominal figure
16:55:44 16 of \$25,000 would be sufficient.

16:55:46 17 THE COURT: In regards to your statement
16:55:49 18 that the bond is mandatory, is that based on your
16:55:55 19 reading of the rule or some other source?

16:56:01 20 MR. FABERT: I think the language of the
16:56:03 21 rule states the court may issue a preliminary injunction
16:56:06 22 or a temporary restraining order only if the movant --
16:56:10 23 if the movant gives surety in an amount that the court
16:56:15 24 considers proper. And so, the black letter language of
16:56:17 25 the rule, I think, makes it obligatory to impose some

16:56:21 1 requirement on the security bond.

16:56:27 2 THE COURT: Thank you. Plaintiffs want to
16:56:30 3 be heard in regards to a request that a bond be set at
16:56:33 4 this time?

16:56:33 5 MS. WOODY: Yes, Your Honor. It's
16:56:34 6 plaintiff's position that Rule 65 provides the court
16:56:36 7 with discretion as to whether or not to enter a bond.
16:56:39 8 Based on the court's finding that there is no
16:56:41 9 affirmative action required by the state in this matter,
16:56:44 10 and no damages -- that there would be no damages to the
16:56:48 11 state from proceeding under the injunction, and as I
16:56:51 12 believe that injunctions of this nature have been
16:56:53 13 granted without bond as evidenced by the case that we
16:57:00 14 have cited to you, which is Judge Smith in the Western
16:57:02 15 District granted an injunction without a bond, and we
16:57:07 16 would draw the court's attention to the Tenth Circuit
16:57:10 17 case of Coquina Oil Corp versus Transwestern Pipeline
16:57:14 18 Company, there's no bond necessary absent the proof of
16:57:17 19 showing of likelihood of harm to the state.

16:57:21 20 THE COURT: Anything else?

16:57:23 21 MS. WOODY: No.

16:57:25 22 MR. FABERT: I don't believe so.

16:57:27 23 THE COURT: In regards to the rule, the rule
16:57:29 24 has the language that you've put on the record,
16:57:33 25 Mr. Fabert. I would tell you that courts have actually

16:57:37 1 weighed in, in regards to that language. I refer the
16:57:41 2 record to a case of RoDa Drilling Company versus Siegal
16:57:45 3 at 552 Fed 3rd 1203, at 1215, a Tenth Circuit case from
16:57:51 4 2009, noting wide latitude of trial courts in
16:57:56 5 determining whether to require a bond, despite what
16:58:00 6 appears to be the plain reading of the rule. It appears
16:58:07 7 to be something which this court has discretion based on
16:58:12 8 the court's interpretation of the rule. Again, the
16:58:15 9 court made its ruling. I believe in good faith the
16:58:23 10 state has asked for a bond to be imposed. At this time,
16:58:29 11 again, it's an early stage of these proceedings. The
16:58:32 12 record's not fully developed. The court under these
16:58:36 13 circumstances does not believe that a bond should be
16:58:40 14 required. I don't believe that there's been a
16:58:45 15 sufficient showing of likelihood of harm by the court
16:58:49 16 not issuing the bond. Bond request has been considered
16:58:52 17 by the court. At this time, at this hearing, that
16:58:56 18 request is denied. If there's nothing else from the
16:58:59 19 parties, this hearing's adjourned. Thank you.

16:59:08 20 MR. CHANAY: I'm sorry, Your Honor, I just
16:59:10 21 had one question. Is the state free to continue under
16:59:13 22 process of developing its permanent regulations by
16:59:16 23 taking evidence from the public and comment on the
16:59:18 24 regulations as they have intended for the -- for the
16:59:22 25 permanent application? I would certainly understand

16:59:25 1 your ruling to keep them from implementing them, but may
16:59:28 2 they at least continue on in the development process and
16:59:32 3 taking public comment and information for those
16:59:34 4 regulations?

16:59:38 5 THE COURT: I don't know if I need to hear
16:59:39 6 from plaintiffs in regards to that, because I would find
16:59:42 7 the plaintiffs have specifically addressed what relief
16:59:46 8 they were requesting. I don't think the relief the
16:59:48 9 court has granted in any way would interrupt or
16:59:52 10 interfere with that part of the process from continuing.

16:59:56 11 MR. CHANAY: All right. Very good.

16:59:57 12 THE COURT: Anything else?

16:59:57 13 MR. CHANAY: No, Your Honor.

16:59:58 14 THE COURT: If there's nothing else, this
17:00:00 15 hearing's adjourned. Thank you.

16 (Whereupon court recessed proceedings.)

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2 C E R T I F I C A T E
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5 I, Nancy Moroney Wiss, a Certified Shorthand Reporter
6 and the regularly appointed, qualified and acting
7 official reporter of the United States District Court
8 for the District of Kansas, do hereby certify that as
9 such official reporter, I was present at and reported in
10 machine shorthand the above and foregoing proceedings.

11 I further certify that the foregoing transcript,
12 consisting of 52 typewritten pages, is a full, true, and
13 correct reproduction of my shorthand notes as reflected
14 by this transcript.

15 SIGNED July 12, 2011.

16

17 S/ _____

18 Nancy Moroney Wiss, CSR, CM, FCRR

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